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Issue Date: 07 July 2008

CASE NO.: 2008-TLC-00035; 2008-TLC-00036

In the Matter of:

ZIRKLE FRUIT COMPANY,
Respondent.

BEFORE: ROBERT B. RAE
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations found at 20 C.F.R. Part 655, Subpart B. The two cases have been consolidated for hearing and decisional purposes by agreement of the parties.

On June 3, 2008, Respondent, by and through counsel, requested a *de novo* hearing before an administrative law judge on the non-acceptance for processing of its H-2A application for temporary alien labor certification pursuant to 20 C.F.R. § 655.104(c)(3). There was no request by Respondent for an “expedited hearing” pursuant to 20 C.F.R. § 655.112(b). A hearing was held in Yakima, WA, on June 17, 2008 at which evidence was taken, witnesses were called and argument was presented by both parties. This Decision and Order is issued today since the transcript was not received until the late afternoon of July 2, 2008.

STATEMENT OF THE CASE

Respondent has appealed the determination of the Certifying Officer (CO) at the Chicago National Processing Center (NPC) of the U. S. Department of Labor, Employment and Training Administration, denying its request for temporary agricultural labor certification for a total of eighty (80) job opportunities in the cherry and apple picking job areas, listed as “Farm Worker Fruit II.” for both jobs.

Respondent is a large, well-organized and technologically-advanced fruit growing company which has various types of fruit orchards throughout the State of Washington, encompassing in excess of 11,000 acres of land. At issue in this matter are two applications, one of which involving cherry pickers and the second of which involving apple pickers. An initial modification letter was sent with regard to the cherry pickers on May 23, 2008 which required modification in the wage rates proposed and which also raised a timeliness issue. The timeliness issue was addressed to the satisfaction of both parties, however, a second letter of modification was sent to Respondent on May 29, 2008 requiring wage rate modification. This demand, together with the initial letter of modification in the case of the apple pickers requiring modification of the wage rate, dated May 29, 2008, resulted in the filing of Respondent's request for an administrative hearing.

Respondent contends that the Certifying Officer's determination of the prevailing piece rate wage is "legally incorrect, arbitrary and capricious" for two reasons:

1. There is no "prevailing piece rate" for harvesting either cherries or apples in the State of Washington; and
2. Even if there were a "prevailing piece rate" for harvesting these fruits, the method used to purportedly calculate the piece rates required by the OFLC Administrator's decision was arbitrary and capricious.

Respondent contends that the provisions for conducting a wage rate survey under the U.S. Department of Labor ET Handbook Number 385 (hereinafter referred to as ET 385 or RX 1) were not complied with by the Employment Security Department, making the results "arbitrary and capricious."

The Administrative File provided by the Director, together with the additional exhibits offered and admitted at the hearing, support the determination that "budget restraints" most certainly impacted the manner in which the surveys were conducted. No personal interviews were conducted in either case and various other provisions of the manual were either not followed or were modified in order to complete the surveys. Information received for the surveys which may have been helpful to the Respondent was not accounted for in the actual determination of the wage rates imposed by the CO.

DISCUSSION

The Immigration and Nationality Act's H-2A program is governed by 8 U.S.C. §1101(a)(H)(ii)(a) and 20 C.F.R. § 655.90 *et seq.*, and allows an employer to hire temporary alien agricultural workers if DOL determines that there are insufficient qualified, eligible U. S. workers who will be available at the time and place needed to perform the identified work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect U. S. workers similarly situated. 8 U.S.C. § 1188; 20 C.F.R. § 655.100(a)(4)(ii).

The statutory scheme for this program seeks to promote and balance two competing interests – “to assure [American Farmers] an adequate work force on the one hand and to protect the jobs of the citizens on the other.” *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). Furthermore, it is the clear desire of the INA “to protect domestic workers,” not to protect employers or alien workers. *Elton Orchards v. Brennan*, 50 F. 2d 493,499 (1st Cir. 1974).

The burden of proof in the labor certification process remains with the Employer. *Garber Farms*, Case. No. 2001-TLC-5 (ALJ May 30, 2001); *Giaquinto Family Restaurant*, Case. No. 1996-TLC-INA-64 (May 15, 1997).

No independent wage survey was conducted by the Respondent but testimony from Mr. Paul Stiekma provided a great deal of information about the variety of different types of cherries and apples grown and harvested by Zirkle. (Transcript pp. 22-78). Of particular note, was his in-depth testimony about the need for a variety of levels of pickers and the changing types of “picking” that they would be involved in during various times throughout the harvest of each fruit. The Respondent has many different orchards of many different crop densities, types and sizes of fruit. The Respondent uses the latest techniques to grow fruits that are easier to pick, more prolific in a smaller area and have a wide variety characteristics which, he testified, were not considered in the surveys.

The propriety of the surveys is the crux of the issues presented in this matter. The Respondent contends that the surveys were “arbitrary and capricious” generally for the following reasons:

1. Varies, the “51% Rule” was not met in any instance of the surveys;

2. The pertinent provisions of ETA 385 were not followed;
3. The survey forms used asked for one piece rate as opposed to a “range” of rates;
4. The surveys required a “piece rate” for all harvests of a particular fruit, without taking into consideration whether “strip picking” or sorting for color, trellised or not, density, etc., despite having asked for and received this information; and
5. No allowance was made for companies that pay a base hourly wage along with piece rate wage incentives.

The Regulations are silent as to the proper method for reviewing a wage determination in H-2A cases. In *Western Range Association*, 2000-TLC-10 (ALJ April 2000), Chief Judge Vittone, citing *El Rio Grande*, 1998_INA-133 (Feb. 4, 2000)(*en banc*) citing *COBRO Corp.*, ARB Case No. 97-104 (July 30, 1999), slip op. at 23, notes that “... the central question on appeal... is not whether a different methodology from the one chosen by the Administrator might have been *more* reasonable, but simply whether the Administrator’s chosen methodology is consistent with law and the facts before us.” This rationale is also applicable in this matter, despite being raised in a different statutory context. *Western Range Association* is also distinguishable from the case at bar since the Respondent actually provided an alternate survey, which is not true in the case at bar.

Legal sufficiency is not defined by the regulations but the “arbitrary and capricious” standard for section 655.112(a) appeals (See *Bolton Spring Farms*, 2008-TLC-28 (ALJ May 2008) and *Bussa Orchards*, 2008-TLC-31 (ALJ May 2008)) I find is applicable to section 655.112(b) appeals as well.

Counsel for the Administrator moved for Judgment at the close of Respondent’s case and at the close of his case in chief, which was taken under advisement and addressed below.

The most troubling aspect of this case is the failure of the ESD to conduct the surveys in accordance with the DOL ETA 385 (RX 1) due to “fiscal” issues. The manual was published over twenty years ago but contains well-reasoned instructions, particularly having to do with the preparation for and conduct of the surveys. See RX 1, p. I-114, para. I(A)(3) which states “Before conducting a survey, the State agency should assure itself that the planned sample will yield data which will be representative of the wage rates paid in the crop activity.” Issues raised by the Respondent in this case center around the failure of the ESD to recognize the distinction between “apples and oranges,” so to speak. The AF, CX 1 – 6, and the testimony for the

Respondent, all indicate that “crop activity” as defined in RX 1, p. I-113, para. I(A)(1), plays an important role in determining wage rate. It states that “A single job title, such as “harvest”, may apply to the entire crop activity. On the other hand, different stages of the harvest, such as “cotton, 1st pick, 2nd pick, and strip, may be involved; or, a different use of the commodity such as “tomatoes, fresh” or “tomatoes, canning.” In such cases, the important consideration is whether the work is different enough to cause the wage structure to be different.” The manual is clear about how a survey should be conducted and what matters should be addressed in taking the surveys.

Ms. Piott, witness for the Complainant, admits in her testimony that budgetary restraints “impacted a great deal” on the ability to conduct the surveys. (Transcript at p.135, ln. 13). She also stated that no consideration was made for the “crop activity” involved in the relevant orchard industry in the State of Washington in the determination of the wage rates. However, she felt confident that they had “a prevailing rate.” (Transcript at p.136, ln. 23).

SUMMARY

While the ESD did not perform “perfectly” in their conduct of the surveys, the surveys were done using what assets the agency had available to them at the time. There was no showing of malice or bias in any phase of the process resulting in the denial of the labor certifications.

The Respondent may, or may not, be unique in the State of Washington, with respect to its “crop activities” and advanced technologies in the cherry and apple orchard industry. However, no evidence was offered to support either contention. It is uncontroverted that Zirkle Fruit Company grows a vast array of different varieties of cherries and apples, each with their own unique qualities, making harvesting a challenging task. However, there has been no evidence offered by Respondent to support the contention that the results were skewed against them or that the numbers utilized in the survey were invalid. ESD may not have addressed each and every “crop activity” in the state, but their overall approach was reasonable in light of the complexity of the issue and the innate difficulty associated with making a state-wide wage determination in any event.

The manual is essentially a tool used to effectuate the policies set forth in the statutes and regulations but it does not have the same legal efficacy. Departure from its guidelines is not fatal to the surveys themselves. There could very well be circumstances wherein the cumulative

effect of repeated and material departures from the provisions would result in a survey which is violative of the law, but this is not one of them.

Additionally, I do not find the actions of the Certifying Officer “arbitrary or capricious. Despite the compelling nature of the Respondent’s equity argument and good intentions, I must, and hereby do, **AFFIRM** the Certifying Officer’s denial of the labor certifications.

Claimant’s Motion for Judgment is **HEREBY DENIED**.

A

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.